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In the

Supreme Court of the United States

October Term, 1997

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,
Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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28 pp

QUESTION PRESENTED

Does a trial court abuse its discretion by subjecting to strict scrutiny a federally authorized statute which does not penalize any fundamental right, and which merely limits a new resident's welfare benefits to the level of benefits received or receivable in the state of prior residence for a period of one year?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED iii

IDENTITY AND INTERESTS OF AMICUS CURIAE 1

OPINION BELOW 2

STATEMENT OF FACTS 2

REASONS FOR GRANTING THE WRIT 4

ARGUMENT 4

I. THIS CASE CONFLICTS WITH RULINGS OF THIS COURT 4

II. WELFARE BENEFITS CASES DECIDED IN THE SAME TIME PERIOD AS *SHAPIRO* UNDERCUT *SHAPIRO'S* ABSOLUTIST ANALYSIS 12

III. LOWER COURTS' WIDELY VARYING ANALYSES DEMONSTRATE THE NEED FOR GUIDANCE FROM THIS COURT 15

Page

IV. RULES OF STARE DECISIS AND PRECEDENT DO NOT PREVENT THE SUBSTANTIAL NARROWING OR OVERRULING OF THE *SHAPIRO* LINE OF CASES 18

CONCLUSION 19

TABLE OF AUTHORITIES CITED

Page

Cases

Anderson v. Green, 513 U.S. 922 (1994) 1, 3

Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986) 10-11

Brown v. Board of Education, 347 U.S. 483 (1954) 18

Dandridge v. Williams, 397 U.S. 471 (1970) 12-13, 17

Dunn v. Blumstein, 405 U.S. 330 (1972) 6-8

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 18

Geduldig v. Aiello, 417 U.S. 484 (1974) 1

Graham v. Richardson, 403 U.S. 365 (1971) 13

Graves v. People of the State of New York, 306 U.S. 466 (1939) 18

Green v. Anderson, 26 F.3d 95 (9th Cir. 1994) 3-4

Hicks v. Peters, 1998 WL 424176 (N.D. Ill. 1998) 15-16

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) 10

Jefferson v. Hackney, 406 U.S. 535 (1972) 14

Page

Jones v. Milwaukee County, 168 Wis. 2d 892, 485 N.W.2d 21 (1992) 17

Joseph v. City of Birmingham, 510 F. Supp. 1319 (E.D. Mich. 1981) 8-9

Lascaris v. Shirley, 420 U.S. 730 (1975) 1

Maldonado v. Houstoun, 177 F.R.D. 311 (E.D. Pa. 1997) 16

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) . 1, 7-8, 10-11, 13-14, 17-19

Payne v. Tennessee, 501 U.S. 808 (1991) 18-19

Plessy v. Ferguson, 163 U.S. 537 (1896) 18

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 12

Shapiro v. Thompson, 394 U.S. 618 (1969) ..... *passim*

Sosna v. Iowa, 419 U.S. 393 (1975) 7-9

Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) 18

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 18

Vlandis v. Kline, 412 U.S. 441 (1973) 8

Page

Warrick v. Snider, 1997 WL 875695 (W.D. Pa. 1997) 16

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 18

Westenfelder v. Ferguson, 998 F. Supp. 146, 1998 WL 127877 (D.R.I. 1998) 16-17

Zobel v. Williams, 457 U.S. 55 (1982) 9, 11, 15

United States Constitution

Article IV 9, 12

Statutes

42 U.S.C. §§ 601-1788 1-2

§ 604(c) 3

Welf. & Inst. Code § 11450.03 3

Rules of Court

Supreme Court Rule 10.1 4

Rule 37 1

Rule 37.6 1

Page

Miscellaneous

Hoke, *State Discretion Under New Federal Welfare Legislation*, 9 Stan. L. & Pol'y Rev. 115 (1998) 2

Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike*, 31 Val. U. L. Rev. 893 (1997) 11,13

IDENTITY AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioners Eloise Anderson, *et al.*[1] Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the welfare reform arena will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous other cases before this Court including the previous incarnation of this case, *Anderson v. Green*, 513 U.S. 922 (1994), as well as other welfare reform cases such as *Lascaris v. Shirley*, 420 U.S. 730 (1975), and *Geduldig v. Aiello*, 417 U.S. 484 (1974).

PLF believes that temporary, nondrastic restrictions on welfare benefits distributed to residents within their first year of arrival in a state do not violate the constitutional right to travel. The absolutist equal protection analysis of *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), need not, and should not, control the outcome of this litigation. This Court's decisions have followed a trend away from the analysis in those two cases and, in fact, that analysis has been unable to command a majority of this Court since 1974, a scant five years after it was introduced. Nonetheless, since Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (welfare reform act),

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Public Law No. 104-193, 42 U.S.C. §§ 601-1788, specifically authorizing durational residency requirements for the receipt of a state's highest level of welfare benefits, several lower courts, including the Ninth Circuit in this case, have used *Shapiro* to strike down such requirements. PLF argues that this Court should grant certiorari in this case to provide guidance to the lower courts as to the applicability of the right to travel doctrine to differences in the levels of welfare benefits provided to recent immigrants to a state.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is published at 134 F.3d 1400 (9th Cir. 1998).

STATEMENT OF FACTS

In 1996, Congress passed and the President signed the welfare reform act. Among other provisions, the welfare reform act replaced the Aid to Families with Dependent Children entitlement with Temporary Assistance for Needy Families and eliminated national eligibility standards. Temporary Assistance for Needy Families, the backbone of the welfare reform act, replaced the open-ended federal financial liability of Aid to Families with Dependent Children with a finite state block grant. Hoke, *State Discretion Under New Federal Welfare Legislation*, 9 Stan. L. & Pol'y Rev. 115, 116 (1998) (*State Discretion*). By providing federal financial assistance in the form of a block grant (instead of individual, program-specific authorizations), Temporary Assistance to Needy Families gives states broad authority to design and implement their own welfare systems. The welfare reform act thus creates a decentralized program that returns to the states the authority to administer welfare programs in a way that best suit their recipients' needs, while remaining true to the national goals of providing assistance to needy families and ending dependency. The welfare reform act

authorizes states to hold welfare benefit levels granted to new residents to the amount they would have received in their state of prior residence. 42 U.S.C. § 604(c).

Following enactment of the welfare reform act, California resurrected Welfare and Institutions Code § 11450.03:[2]

> (a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

Two applicants for California welfare benefits, representing a certified class of all new residents to California, challenged this statute as violating the right to travel under the United States Constitution. Appendix to Petition for Writ of Certiorari (App.) 2, 7. The applicants remained *eligibile* to receive welfare benefits, but Section 11450.03 rendered the *level* of their benefits less than those received by California residents of more than one year. App. 7. On a motion for preliminary injunction, the district court relied on its previous ruling in *Green v. Anderson* and found the statute to be unconstitutional. App. 14-15. The court therefore granted the preliminary injunction. App. 31. The state appealed, and the Ninth Circuit Court of Appeals affirmed. App. 2.

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[2] Welfare and Institutions Code § 11450.03 was the subject of previous litigation prior to enactment of the welfare reform act. The federal district court and Ninth Circuit Court of Appeals struck down the statute as violating the right to travel (*Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994)), and this Court granted review of the case and vacated the Ninth Circuit decision. However, the case was dismissed when the federal waiver to enact the durational residency requirement was withdrawn. *Anderson v. Green*, 513 U.S. 922.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1 lists among the considerations governing review on certiorari the circumstance when a lower court has decided a question of federal law in conflict with decisions of this Court or decided an important question of federal law that has not been, but should be, settled by this Court. As shown below, the issues decided by the Ninth Circuit Court of Appeals in this case are both in conflict with rulings of this Court and of the utmost national importance that requires prompt guidance from this Court. Amicus Curiae Pacific Legal Foundation urges this Court to grant the petition for writ of certiorari sought by Eloise Anderson, the Director of the California Department of Social Services, *et al.*, in this case.

ARGUMENT

I

THIS CASE CONFLICTS WITH RULINGS OF THIS COURT

Shapiro v. Thompson is the hook on which the court below hung its hat.[3] *Shapiro* invalidated a one-year residency requirement imposed before *any* welfare benefits could be collected because the Court found no compelling state interest capable of justifying the requirement. *Shapiro*, 394 U.S. at 642. Among the state interests the Court found admittedly permissible but noncompelling were (1) discouraging the influx

[3] The district court opinion in this case adopted its previous decision in *Green v. Anderson* by reference. App. 26-27. The Ninth Circuit similarly relied on its decision in *Green* affirming the lower court opinion as persuasive authority. App. 8-9. Thus, although the court below stated that it was avoiding a decision of this case on the merits (App. 12), its decision relying on *Green* and upholding the district court's analysis that plaintiffs would probably prevail on the merits has the same effect as a straightforward decision on the merits.

of poor families; (2) facilitating the planning of the welfare budget; (3) providing an objective test of residency; (4) minimizing the opportunity for recipients to receive payments fraudulently from more than one jurisdiction; and (5) encouraging early entry of new residents into the labor force. *Id.* at 631-32, 634. The Court held that constitutional concepts require that all citizens "be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Id.* at 629. This is undoubtedly true.

Yet, the Court did not analyze the statutes at issue in the light of an "unreasonable burden or restriction." Rather, it invoked the usually fatal strict scrutiny. The Court viewed a state's responsibility to maintain a healthy fiscal policy with an attitude approaching scorn. *Shapiro*, 394 U.S. at 633. Perhaps in 1969, the states simply did not face the fiscal crises that are now so often commonplace, particularly in California. *See* Declaration of Dennis Hordyk, App. 44-45. Justice Harlan, in dissent, immediately foresaw the problems with this analysis and said that when a statute affects only matters not mentioned in the Constitution, and is not arbitrary or irrational, the court is not entitled to pick out particular human activities, characterize them as "fundamental," and give them added protection under an unusually stringent equal protection test. *Shapiro*, 394 U.S. at 662 (Harlan, J., dissenting). Justice Harlan also recognized the long-range implications of the decision:

> [T]he field of welfare assistance is one in which there is a widely recognized need for fresh solutions and consequently for experimentation. Invalidation of welfare residence requirements might have the unfortunate consequence of discouraging the Federal and State Governments from establishing unusually generous welfare programs in particular areas on an experimental basis, because of fears that the program would cause an influx of persons seeking higher welfare payments.

Id. at 674-75 (Harlan, J., dissenting). In California, the state government expanded its public assistance levels to extremely generous proportions when the state was experiencing a "boom" in population and economic growth. By fiscal year 1996-97, California had the sixth highest grant level in the United States and the highest grant level of the ten most populous states. Declaration of Bruce Wagstaff, App. 36. With the inevitable recession that followed the expansion, California sought to cut back its more profligate spending in ways to harm the fewest people as possible. *Id.* at App. 37 (charting reduction of expenditures). The decision below effectively prevents California from controlling its own welfare budget.

As shown above, *Shapiro*, standing alone, promised catestrophic effects on states' abilities to determine their own welfare policies. Unfortunately, *Shapiro* was quickly followed by two other cases that placed the strict scrutiny straightjacket on states' policymaking functions. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court noted the specific language in *Shapiro* that the decision did not purport to decide whether durational residence requirements could be used to determine voting eligibility (*Shapiro*, 394 U.S. at 638 n.21). Nonetheless, the Court found that a law requiring one year of state residence and three months of county residence before registering to vote *penalized* the right to travel by forcing a person who wishes to travel and change residences to choose between travel and the basic right to vote. *Dunn*, 405 U.S. at 342. *Dunn*, too, emphasized strict scrutiny as the measure of the constitutionality of the law. *Id.* at 343. Despite the Court's disclaimer that it was not "secretly requir[ing] the impossible,"[4] given the strict analysis, the unsurprising result was an invalidated statute. *Id.* at 360.

[4] In dissent, Chief Justice Burger refuted this statement, arguing that "no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection." *Dunn*, 405 U.S. at 363-64 (Burger, C.J., dissenting).

Memorial Hospital v. Maricopa County further expanded the *Shapiro* analysis. That case struck down a statute which prohibited residents of less than 12 months duration from receiving publicly funded nonemergency medical care. *Memorial Hospital*, 415 U.S. at 254. The Court held that the statute penalized interstate travel because medical care is as much "'a basic necessity of life'" to an indigent as the welfare assistance in *Shapiro*. *Id.* at 259. The Court found that the right of interstate travel must be seen as ensuring new residents the same right to vital government benefits and privileges in the states to which they migrate as are enjoyed by other residents. *Id.* at 261. The Court applied strict scrutiny and struck down the statute. *Id.* at 269-70. One of the more bizarre threads that bind *Shapiro*, *Dunn*, and *Memorial Hospital* is the notion that no evidence need exist that any person was actually deterred from traveling by the challenged restrictions. *Shapiro*, 394 U.S. at 650 (Warren, C.J., dissenting); *Dunn*, 405 U.S. at 340; *Memorial Hospital*, 415 U.S. at 257-58. This admitted lack of deterrence should, at the very least, call into question whether the "right to travel" has been implicated at all. After all, if the whole point of the amorphous right to travel is to permit citizens of the United States to move freely throughout the country, the fact that the complainants in all of these cases *did*, in fact, move where they wanted to move, should have significant bearing on the analysis.

The *Shapiro* line of cases has been distinguished on a number of bases by this Court. As early as 1975, the Court had distinguished *Shapiro* and *Memorial Hospital* in a durational residency case. In *Sosna v. Iowa*, 419 U.S. 393 (1975), the Court upheld an Iowa statute which required one year of continuous residence in Iowa before a petition for divorce against a nonresident could be filed. *Sosna*, 419 U.S. at 395. The Court distinguished *Shapiro*, *Dunn*, and *Memorial Hospital* with the observation that "the durational residency requirements they struck down were justified on the basis of budgetary or

recordkeeping considerations." *Sosna*, 419 U.S. at 406. Iowa's state interest was to ensure recognition of its divorce decrees by other states under the Full Faith and Credit Clause of the Constitution. This was considered a more potent state interest than fiscal matters. The Court upheld the statute without specifying a standard of review. The opinion balanced the state interest in favor of the statute against the burden on the right to travel, concluding that the former outweighed the latter. *Id.* at 406, 409-10. The Court emphasized that the gravamen of Sosna's claim was not a *total deprivation*, but only delay. *Id.* at 410. This same statement distinguishes this case from *Shapiro*, *Memorial Hospital*, and *Dunn*. In each of the earlier cases, the claimant was *totally* cut off from welfare benefits, nonemergency medical care, or voter registration. In this case, the statute only *partially* restricts welfare payments for a limited time.

Sosna threw considerable doubt on the viability of the *Shapiro* line of cases.[5] Justice Marshall, in dissent, said the majority opinion "departs sharply" from *Shapiro*, substituting an "*ad hoc* balancing test" for strict scrutiny. *Sosna*, 419 U.S. at 418-19 (Marshall, J., dissenting). *Joseph v. City of Birmingham*, 510 F. Supp. 1319, 1335 n.23 (E.D. Mich. 1981) (upholding one-year residency requirement for candidates for municipal office) interpreted *Sosna* as foreshadowing possible abandonment of *Shapiro's* invocation of strict scrutiny based on the notion that migrating welfare recipients would find their new state less attractive and were thus "penalized" by their voluntary move. Moreover, *Joseph* favored the balancing test used in *Sosna*, noting the particular factors to take into account: (1) the importance of the benefit withheld from recently arrived residents (this includes both the severity of the effects on the lives of these recently arrived residents who are denied the benefit and the constitutional stature of the benefit itself); (2) the

[5] *See also Vlandis v. Kline*, 412 U.S. 441, 452-54 (1973) (upholding waiting period for resident tuition at state universities).

extent of the interference with interstate travel (*i.e.*, the actual likelihood of deterring such travel); (3) the legislative intent; and (4) the governmental interests fostered by the law. *Joseph*, 510 F. Supp. at 1335 n.23. These four factors were derived from Justice Harlan's dissent in *Shapiro* (*Shapiro*, 394 U.S. at 663, 671 (Harlan, J., dissenting)) which apparently formed the basis of the majority *Sosna* opinion. *Sosna*, 419 U.S. at 406-09 (majority); 419 (Marshall, J., dissenting).

Applying neither the *Shapiro* strict scrutiny analysis nor the *Sosna* balancing test, *Zobel v. Williams*, 457 U.S. 55 (1982), invalidated an Alaska law allocating oil reserve dividends in amounts based on the length of each citizen's residence (*id.* at 57, 65) under the rational basis test without reaching the question of whether the program penalized the exercise of the right to travel. *Id.* at 60-61, 65. This Court found that rewarding citizens for past contributions was not a legitimate state purpose. *Id.* at 63. The Court distinguished the *Shapiro* line of cases because the Alaska statute did not impose any threshold waiting period before receiving benefits; rather, it created "fixed, *permanent* distinctions" between all residents of Alaska, depending on how long they have been in the state. *Id.* at 59 (emphasis added). *Zobel* is more notable for Justice O'Connor's concurrence using a very different analysis. Justice O'Connor suggests an approach based on the Privileges and Immunities Clause of Article IV of the Constitution. *Id.* at 74-78 (O'Connor, J., concurring). She argued that a statute must satisfy a two-part test if it burdens a nonresident or new resident who seeks to engage in an essential activity or exercise a basic right. *Id.* at 76. First, there must be something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed. *Id.* Second, the Court must find a substantial relationship between the evil and the discrimination practiced against the noncitizen. *Id.* Applying this test, Justice O'Connor found that even if new residents were a peculiar source of the "evil" of "partaking in current largesse without having made

prior contributions," *id.* at 77, a contention Justice O'Connor found unpersuasive, the cure does not bear a substantial relationship to the malady because some people who migrated to Alaska may have contributed significantly more to the state, both before and after their arrival, than have some natives. *Id.* at 78.

In *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), the Court held that a New York state limit on civil service veterans' preference to only those veterans who were residents of the state when they entered military service is unconstitutional. The case generated several opinions. Only four justices (Brennan, Marshall, Blackmun, and Powell) held that the right to travel was violated. The analysis in *Soto-Lopez* concentrated on the fact that the immigrant veterans were *permanently* barred from receiving civil service bonus points. *Id.* at 909. The plurality opinion found a "guiding principle" to tie together the various analyses described above: the right to migrate protects residents of a state from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents. *Id.* at 904. That said, however, the plurality promptly "inferred" a penalty on interstate migration in *Zobel* and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), and returned to strict scrutiny review. *Id.* at 908.

Justice O'Connor, in dissent, strongly chastised this maneuver, noting that

> "the plurality simply rejects the equal protection approach the Court has previously employed in similar cases [*e.g., Hooper*], without bothering to explain why its novel use of both 'right to migrate' analysis and strict equal protection scrutiny is more appropriate, necessary or doctrinally coherent."

Id. at 919 (citations omitted) (O'Connor, J., dissenting). Note also, that this case elevates public employment to the same level as the "necessities of life" analyzed in *Shapiro* and *Memorial Hospital*. Chief Justice Burger, who provided the fifth vote in *Soto-Lopez*, would not have reached the right to travel issue at all because the case could have been resolved on straight equal protection grounds. *Id.* at 912-13 (Burger, C.J., concurring in the judgment). Thus, strict scrutiny for right to travel issues has not been accepted by a majority of this Court since *Memorial Hospital* in 1974.

In *Soto-Lopez*, Justice O'Connor's dissent (joined by Justices Rehnquist and Stevens) was based on her analysis of the Privileges and Immunities Clause. *Id.* at 920 (O'Connor, J., dissenting). Finding any impact on the right to travel to be "ephemeral," Justice O'Connor used only the rational basis standard, which the law withstood. *Id.* at 924 (O'Connor, J., dissenting). As one commentator noted, *Soto-Lopez* leaves lower courts with little guidance in right to travel cases. Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike*, 31 Val. U. L. Rev. 893, 906-07 (1997) (Zubler) (noting that only four justices, none of whom are currently on this Court, invoked *Shapiro* in its pure form; the two justices who followed *Zobel's* enhanced rational basis have also left the Court, and the three remaining justices sought to divorce the right to travel from Equal Protection and analyze it under the Article IV Privileges and Immunities Clause; as such, "this area of jurisprudence is obviously unstable, and it appears ripe for both clarification and fundamental correction").

The winding path of the "right to travel" doctrine demonstrated by the cases analyzed above has almost necessarily resulted in disarray among the lower courts deciding cases based on this doctrine. Part of the problem appears to be a failure to grasp where the path begins, e.g., from where in the Constitution the right to travel is derived. Without a clear understanding of the context in which the right to travel arises, lower courts simply pick and choose among a variety of analyses based on any one of several possible constitutional doctrines. Such

haphazard analyses can only be remedied by this Court's review and guidance.

II

WELFARE BENEFITS CASES DECIDED IN THE SAME TIME PERIOD AS *SHAPIRO* UNDERCUT *SHAPIRO'S* ABSOLUTIST ANALYSIS

Citizens have no constitutional right to welfare benefits. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33 (1973). Thus, it is instructive to overlay the cases in which welfare benefits are constitutionally denied, in whole or in part, with the cases that purport to straightjacket the way states distribute welfare benefits among their populations. However, the court below made no attempt to reconcile this line of cases with its decision that any distinction in the level of welfare benefits must be subjected to strict scrutiny.

Dandridge v. Williams, 397 U.S. 471 (1970), upheld a Maryland regulation which resulted in some disparity in payments to the largest Aid to Families with Dependent Children (AFDC) families against a challenge that the regulation violated the Equal Protection Clause. The Court established the following test:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." . . . "The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Id. at 485 (citations omitted). The Court recognized that public assistance programs may give rise to inequalities in their design and administration and nonetheless ruled: "But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination." *Id.* at 486-87 (citations omitted). The Court explicitly stated that it was not ruling that the Maryland policy before it was wise or best fulfilled the relevant social and economic objectives that the state might ideally espouse, nor that it was the most humane and just system that could be devised.

> But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Id. at 487 (citations omitted). *Memorial Hospital*, 415 U.S. at 262 n.21, distinguishes *Dandridge* on the basis that the classification in *Dandridge* did not impinge upon a fundamental right. *See Graham v. Richardson*, 403 U.S. 365, 376 (1971). Yet, in *Memorial Hospital*, 415 U.S. at 279 (Rehnquist, J., dissenting), Justice Rehnquist pointed out the potential race to the bottom that could result as an unintended consequence from the Court's opinion. *See also* Zubler at 933-38 (logical result of *Shapiro* and its progeny is that each state will avoid having more generous benefits that any other state to avoid (1) being a welfare magnet and (2) running into constitutional problems created by *Shapiro*'s application of strict scrutiny to all disparaties in benefits). Thus, on the one hand, the Court says

it will resist the temptation to become a superlegislature and allow the states to make the public assistance decisions; while on the other hand, the *Shapiro* line of cases severely curtails the options available to the states. *Id.* at 287 (Rehnquist, J., dissenting).

In *Jefferson v. Hackney*, 406 U.S. 535 (1972), this Court upheld the Texas policy of providing a lower percentage of the state's total pool of welfare benefits to families with dependent children than was provided to aged, blind, or disabled adult recipients, which was attacked as violating the Equal Protection Clause. Applying traditional rational basis analysis, the Court held that the disparities were neither irrational nor invidious. *Id.* at 547. Moreover, state legislatures are permitted to address an issue one step at a time without necessarily running afoul of the constitution: "[T]he legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them." *Id.* at 546-47 (citation omitted). This Court in *Jefferson* specifically addressed the question of providing a lower percentage of payment to certain classes of recipients.

> Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living . . . . Whether or not one agrees with this state determination, there is nothing in the Constitution that forbids it.

Id. at 548-49. By analogy, it is not irrational to believe that new residents are not disadvantaged by receiving the same amount of AFDC benefits as they would have received in their original state of residence (as well as additional California benefits that may or may not have had counterparts in the original state). *See*

Wagstaff Declaration at App. 38 (new residents may be eligible for a Special Needs Allowance for homeless assistance, full Medicaid benefits, and food stamps). The statute at issue in this case does not place immigrants to California in the position the Court believed they possibly faced in *Shapiro*--either stay where they were or starve. This statute maintains the level of benefits the recipients received at their former residence and also places no restrictions on receipt of non-AFDC benefits. This Court should grant certiorari to clarify whether (and to what extent) the right to travel doctrine exists in the context of state welfare benefits.

III

LOWER COURTS' WIDELY VARYING ANALYSES DEMONSTRATE THE NEED FOR GUIDANCE FROM THIS COURT

Congress' enactment of the welfare reform act prompted many states to implement the durational residency requirements specifically authorized by that legislation. Federal courts have subsequently been struggling with this Court's *Shapiro* line of cases . . . and coming to very different results.

In *Hicks v. Peters*, 1998 WL 424176 (N.D. Ill. 1998), the district court considered a challenge to Illinois' durational residency requirement, which, like California's, restricts first year residents to the benefit levels they would have received in their state of prior residence. The *Hicks* court dodged the issue of what level of scrutiny to apply to the challenge. Instead, the court found that the Illinois statute failed rational basis review under the Equal Protection analysis applied in *Zobel* because the statute's only stated purpose was to encourage self-sufficiency and end welfare dependency, and because it did not distinguish between in-state and out-of-state residents. *Id.* at *3. In dicta, however, the court added that it would also find that the Illinois durational residency requirement did not impose a penalty on the

right to travel. *Id.* The court reasoned that Hicks does receive some state benefit payments and receives the same amount that she had been receiving in Alabama before she moved to Illinois.

The court in *Maldonado v. Houstoun*, 177 F.R.D. 311, 329-30 (E.D. Pa. 1997), struck down a state statute that capped welfare benefits at a recipient's former state's levels. The district court applied its interpretation of right-to-travel jurisprudence and held that the plaintiffs could not show that the primary objective of Pennsylvania's residency requirement was to deter migration, that the statute actually deterred such travel, or that it used a classification that penalized the right to travel. Because plaintiffs proved none of these three elements, the court applied rational basis review to the Pennsylvania statute and found that it was not rationally related to its only legitimate governmental purpose of encouraging self-reliance over reliance on welfare. *Id.* at 332-33. Citing *Shapiro*, the court reasoned that the residency requirement "failed miserably" at promoting self-sufficiency. *Id.* at 332. To be rationally related the court reasoned that "logic would also require a similar waiting period for long term residents" and a standard amount that all out of state and non-American citizens ought to receive. *Id. See also Warrick v. Snider*, 1997 WL 875695 (W.D. Pa. 1997) (relying heavily on *Maldonado* to strike down a 60 day durational residency requirement for cash assistance as failing both strict scrutiny and rational basis review).

In *Westenfelder v. Ferguson*, 998 F. Supp. 146, 1998 WL 127877 (D.R.I. 1998), the district court struck down a state law that reduced welfare benefit levels by 30% for all residents who resided in Rhode Island less than 12 months. The court found that the law constituted a penalty, and therefore triggered strict scrutiny, because it "denie[d] the plaintiffs' benefits needed to

ensure their ability to procure basic necessities of life." *Id.* at *6. It also held that the only relevant comparison was newly arrived residents to long-time residents, and that reduction versus complete denial (as in *Shapiro*) did not create a material difference. The district court went on to find that Rhode Island failed to demonstrate how a durational residency requirement was narrowly tailored to ending dependence on welfare, nor would it likely pass even rational basis review.

Even before passage of the welfare reform act, the Wisconsin Supreme Court found *Shapiro* unpersuasive. In *Jones v. Milwaukee County*, 168 Wis. 2d 892, 485 N.W.2d 21 (1992), the Wisconsin Supreme Court upheld a state statute which required 60 days residence to be eligible for general relief. The court addressed *Shapiro* and *Memorial Hospital's* "penalty" analysis, but held that 60 days without welfare is substantially less onerous than a one year deprivation; the minimal deprivation did not amount to a penalty on right to travel. *Id.* at 25-26. The court focused on numerous state interests. The court found legitimate interests, *inter alia*, in preserving the public fisc, conserving scarce taxpayer funds in upholding the law, and not encouraging "'those who would precipitously alter their situation in life without giving any thought to whether there is any reasonable prospect that they will be able to support themselves.'" *Id.* at 26. The *Jones* court relied in part in *Dandridge v. Williams*, 397 U.S. 471, which established that welfare eligibility requirements did not penalize the right to travel.

Lower courts' inconsistency in applying a standard of review to the durational residency requirements approved by the welfare reform act has left this very important area of the law in disarray. This Court should grant certiorari in this case to promptly provide guidance to the lower courts in addressing this recurring issue.

IV

RULES OF STARE DECISIS AND PRECEDENT DO NOT PREVENT THE SUBSTANTIAL NARROWING OR OVERRULING OF THE *SHAPIRO* LINE OF CASES

This Court has always acknowledged a power in constitutional questions--great or small--to revisit its past decisions, and modify or abandon them altogether. *See Brown v. Board of Education*, 347 U.S. 483 (1954), *overruling Plessy v. Ferguson*, 163 U.S. 537 (1896); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), *overruling Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). *Cf. Graves v. People of the State of New York*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring) (stating that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it").

Stare decisis is not authoritative when the precedent has proven "'unsound in principle and unworkable in practice.'" *Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989). The Court "has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 779 (1986) (Stevens, J., concurring). Moreover, the effect of stare decisis is limited in closely divided cases, or in cases in which there were vigorous dissenting opinions. *Payne v. Tennessee*, 501 U.S. 808, 828-29 (1991) (noting prior precedent could be overruled because they "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions").

In this case, the lower courts' reliance on *Shapiro* and *Memorial Hospital* was unwarranted. The *Shapiro* line of cases

temporarily elevated the right to travel to strict scrutiny analysis despite the lack of definition of the "right to travel" in the Constitution and despite other cases explicitly holding that states may be left to their own devises to determine the level of welfare benefits available to their citizens. This Court has not actually followed the reasoning of these cases since 1974, yet obviously some lower courts, including the court below, still feel constrained by them. Without clear guidance from this Court, lower courts hesitate to issue opinions they may view as contrary to Supreme Court jurisprudence. The *Shapiro* court itself noted that its decision bucked literally centuries of English and American tradition. *Shapiro*, 394 U.S. at 628 n.7 (noting that waiting period requirements date back at least to the English Law of Settlement and Removal of 1662). Moreover, Congress and 46 state legislatures had chosen to implement residency requirements for receipt of public assistance. *Shapiro*, 394 U.S. at 676 (Harlan, J., dissenting). The tremendous impact of the *Shapiro* line of cases in terms of the number of statutes it invalidated is still being felt today.

This case gives this Court the opportunity to choose one of the many tests applied to right to travel issues, and assert its primacy over the others.

CONCLUSION

Review by this Court is necessary to resolve this recurring question of national importance. Because the application of absolutist strict scrutiny to right to travel issues is grounded neither in the Constitution nor followed by a majority of this Court since 1974, the *Shapiro* and *Memorial Hospital* cases should not control the outcome of a temporary, partial reduction in welfare benefits, especially where such reductions are expressly authorized by Congress. For the reasons described

above, amicus curiae respectfully requests this Court to grant the petition for writ of certiorari sought in this case.

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Respectfully submitted,

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